No. 478. 1900.

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JAMES H. McKENNEY, Clerk.

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In the Supreme Court of the United States.

Filed Dec. 10, 1900.

October Term, 1900.

No. 478.

DANIEL H. TALBOT,
Plaintiff in Error,

vs.

SIOUX NATIONAL BANK, OF SIOUX CITY, IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF FOR DEFENDANT ON MOTION TO DISMISS OR AFFIRM.

FRANCIS F. OLDHAM,
Attorney for Defendant.

(17,963.)

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 478.

DANIEL H. TALBOT,
Plaintiff in Error,

vs.

THE SIOUX NATIONAL BANK OF SIOUX CITY, IOWA.

Brief for Defendant on Motion to Dismiss or Affirm.

STATEMENT.

The plaintiff in error, Daniel H. Talbot, on the seventh day of October, 1896, filed his petition against The Sioux

National Bank of Sioux City, Iowa, and James F. Toy, President of said Bank, in the District Court of the State of Iowa, in and for Woodbury County, praying judgment against them for the sum of $16,250, with interest and costs, on account of usurious interest alleged to have been taken from plaintiff "within seven years past," and on account of a balance of $250.00 deposited in the bank by plaintiff, and never withdrawn. (Record, pp. 4, 5.)

The defendant, James H. Toy, filed a demurrer to the petition. which was sustained. (Record, p. 8.)

On motion of The Sioux National Bank, plaintiff was required to set forth his cause of action for usury in one count, and his cause of action for the deposit in another count; also to state the amount of usury paid within two years prior to the commencement of the action. (Record, p. 8.)

Plaintiff, thereupon, on May 20, 1897, filed his amended petition against The Sioux National Bank of Sioux City, Iowa, containing three counts.

The first and second counts set forth what are alleged to be the usurious transactions. It is not alleged that any interest was ever *paid*. It is alleged that in a series of transactions between May 27, 1889, and March 4, 1890, in which plaintiff borrowed money from the bank, usurious interest was added to the amount of the several notes, and that, on March 4, 1890, the total indebtedness, including the amount of the usurious interest charged by the bank, was evidenced by a note for $28,000, dated March 1, 1900, made by plaintiff to A. S. Garretson, or bearer, and secured by a mortage upon the real estate of said plaintiff. (Record, pp. 9-15.)

It is further alleged that, before the maturity of this

note for $28,000, on account of the nonpayment of interest thereon, the mortgage was foreclosed by a judgment rendered on or about the sixth day of May, 1891, in the District Court of Plymouth County, Iowa, where the real estate was situated, and under said judgment said real estate was sold. (Record, p. 14.) It is not alleged when the real estate was sold, nor what amount was realized from the sale. It is, however, stated that the purchasers took possession on or about the thirty-first day of May, 1894, from which it may be fairly inferred, and was apparently inferred by the Supreme Court of Iowa, that the sale took place prior to that date. (Record, p. 14.)

As to the third count of the amended petition, plaintiff was ordered to make it more specific (Record, p. 22), and, having failed to do so, it was dismissed (Record, p. 22).

A demurrer was filed by The Sioux National Bank to the first and second counts of the amended petition. Among other grounds stated in the demurrer were a failure to comply with the order of the court to make the petition more specific, and the insufficiency of the petition in law. (Record, pp. 20, 21.) The demurrer was sustained generally (Record, p. 21), and plaintiff failing further to amend the petition was dismissed, and final judgment was rendered for defendant's costs. (Record, p. 22.) On appeal, the judgment was affirmed by the Supreme Court of Iowa on the ground that the petition, as amended, failed to show that any usury was paid within two years prior to the commencement of the action. (Record, p. 32.) Plaintiff in error seeks to have the judgment of affirmance re-examined in this court, upon a writ of error.

ARGUMENT.

I.

The record presents no federal question.

(a) Upon motion of defendant, the trial court ordered plaintiff in his amended petition "to state the amount claimed as usury that was paid within two years next prior to the commencement of this cause of action." (Record, p. 8.) Under this order it was the duty of plaintiff to state, unequivocally, whether any usurious interest was received by the bank within two years, and if any, how much. The order was entirely disregarded. The amended petition simply states facts from which it may be inferred that possibly usurious interest may have been received by means of the foreclosure sale, and probably, if any such interest were received, it was received more than two years before the commencement of the suit. The sixth ground of demurrer by defendant to the amended petition is, that plaintiff "has failed to comply with the former order of the court in this case to make his petition more specific" (Record, p. 21). The demurrer was sustained generally (Record, p. 21). And the petition was dismissed on the demurrer after the failure of plaintiff further to plead. (Record, p. 21.) One ground for the dismissal may well have been the failure of plaintiff to state the facts specifically in regard to the amount realized from the sale, and when realized. These facts were easily accessible to plaintiff.

Section 3764, of the Annotated Code of Iowa, 1897,

provides that an action may be dismissed by the court "for disobedience by the party of an order concerning the pleadings, or any proceeding in the action."

The judgment of dismissal can be sustained, therefore, on the ground that plaintiff disobeyed the order of the court.

To give the Supreme Court of the United States jurisdiction of a writ of error to a state court it must appear affirmatively, not only that a federal question was involved, but that the judgment as rendered could not have been given without deciding such question.

De Saussure vs. Gaillard, 127 U. S. 216.
Johnson vs. Risk, 137 U. S. 300.

(b) There is no color for any claim by plaintiff under a statute of the United States.

The amended petition of plaintiff does not state that any interest was ever paid by plaintiff to the bank. It contains three obvious and fatal defects, either one of which shows conclusively that plaintiff's pretended claim, under section 5198, of the Revised Statutes of the United States is utterly without foundation.

Section 5198 first provides for the forfeiture of all interest upon the usurious note or bill, and relates only to the defensive rights of the borrower. Farmers and Merchants National Bank vs. Dearing, 91 U. S. 32. It then provides as follows: "In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action, in the nature of an action of debt, twice the amount of the interest thus paid from the association, taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred."

First, it is reasonably certain from the averments of the petition that the Bank received no part of the money borrowed by plaintiff, or any interest thereon after it took possession of the land sold under foreclosure proceedings, that is to say, on or about May 31, 1894. As the suit was not commenced until August 29, 1896 (Record, p. 4), there was no cause of action by the express terms of the proviso of section 5198.

Norfolk National Bank vs. Schwenk, 46 Neb. 381.
Bobo vs. Peoples National Bank, 92 Tenn. 444.
Higley vs. First National Bank, 26 Ohio State 75.

This was the ground upon which the Supreme Court of Iowa affirmed the decision of the lower court. (Record, p. 32.)

Secondly, it appears that the only way in which the Bank received any payment on account of the note, which embraced all the former usurious interest agreed to be paid, was by the purchase of the mortgaged premises. It is not stated that the land was sold for more than sufficient to pay the principal sum originally borrowed without interest, nor is it stated that any usury was paid by the foreclosure sale. Whatever was realized from such sale would be applied on the principal, and not on the illegal interest.

McBroom vs. Scottish Investment Co., 153 U. S. 330.
Bank of Cadiz vs. Slemmons, 34 Ohio State 142.

There is no allegation, therefore, nor is there any from which it can be reasonably inferred that the Bank at any time received any interest whatever, directly or indirectly.

Thirdly, the only way in which it is alleged interest

might have been received by the Bank was by enforcement of a judgment of a court of competent jurisdiction in an action brought on behalf of defendant against plaintiff. (Record, p. 14.) The petition itself, therefore, shows that the question of usury reserved in the note sued upon is *res judicata*, and was decided adversely to plaintiff. In that action plaintiff had the right to have the entire interest forfeited if the note embraced usury. This was the full measure of his right and his only remedy. The statute gives him no option to permit judgment to be taken against him and then to recover double the amount of interest collected from him by the law. That would be putting a premium upon the abuse of judicial administration. The ordinary rule of *res judicata* applies. Plaintiff having had his day in court is estopped to reopen the question whether the note embraced usury or not.

Kearney vs. First National Bank, 129 Pa. St. 577.

Hopkins vs. West, 83 Pa. St. 109.

Montagu vs. McDowell, 99 Pa. St. 265.

And it is immaterial whether usury were pleaded in the first action or not.

Heath vs. Frackleton, 20 Wis. 320.

Nor will equity relieve against a judgment at law upon a usurious note when usury might have been pleaded but was not.

Lucas vs. Spencer, 27 Ill. 15.

Chinn vs. Mitchell, 2 Met. (Ky.) 92.

Brown vs. Toell, 5 Rand. 543.

The plaintiff having manifestly failed to state any legal claim under section 5198 of the Revised Statutes of the United States, there is no federal question involved giving jurisdiction to the Supreme Court of the United States.

Section 709 of the Revised Statutes of the the United States, so far as it applies to this suit, is as follows: "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, . . . where any title, right, privilege, or immunity is claimed under . . . any . statute of . . the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under . . such statute, . . may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error . . ."

In Wilson vs. State of North Carolina, 169 U. S. 586, Mr. Justice Peckham, in construing this section, says: "Upon the case made by the plaintiff in error, the federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the federal constitution have been violated, etc." And he quotes with approval from Hamblin vs. Land Co., 147 U. S. 531, where it is said "a real, and not a fictitious, federal question is essential to the jurisdiction of this court over the judgment of state courts"; also from New Orleans vs. New Orleans Waterworks Co., 142 U. S. 79, 87, where it is said "The bare averment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up almost in any case, and the jurisdiction of this court invoked simply for the purpose of delay."

The same principle is maintained in St. L. C. G. & Ft. S. Ry. Co. vs. State of Missouri, 156 U. S. 478.

It is respectfully submitted that the petition of plaintiff fails to give color to any right under a statute of the United States. Merely reciting a statute, as plaintiff has done, does not constitute a claim of right. The only right of *action* given by the statute is an "action, in the nature of an action of debt" to recover twice the amount of the interest paid within two years. Section 5198, Revised Statutes of United States. A petition which does not state that any interest was paid within two years can hardly be said to "set up and claim" a right under the statute.

II.

If it be held, however, that this court has jurisdiction, then it is respectfully submitted that the question presented for re-examination is so clearly without merit as not to need further argument, and that the judgment of the Supreme Court of Iowa should be affirmed.

Abbott vs. National Bank of Commerce, 175 U. S. 419, 414.

Respectfully submitted,

FRANCIS F. OLDHAM,
Attorney for Defendant.

In the Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 478.

DANIEL H. TALBOT,
PLAINTIFF IN ERROR,
vs.
SIOUX NATIONAL BANK, OF SIOUX CITY, IOWA,
DEFENDANT IN ERROR.

Brief of Associate Counsel for Defendant on Motion to Dismiss or Affirm.

ARGUMENT.

THE RECORD PRESENTS NO FEDERAL QUESTION.

The Supreme Court of Iowa based its decision solely upon the finding of fact that the usurious transaction complained of,

if any, occurred "more than two years prior to the commencement of this action." (Record, p. 32.)

On error this court will not review a question of fact found by the Supreme Court of Iowa.

Hedrick vs. Atchison T. & S. F. R. R. Co., 167 U. S. 673.

Egan vs. Hart, 165 U. S., 193.

Dower vs. Richards, 151 U. S., 658.

We submit that the finding by the Supreme Court of Iowa on the defendant's demurrer to plaintiff's petition that the usurious transaction, if any, occurred "more than two years prior to the commencement of this action" has the same force and effect in this court as would a finding of fact based on evidence. The demurrer admitted all the allegations of the petition, and imposed upon the Iowa court the duty of ascertaining what facts were thereby established.

This finding of fact is based on the admitted allegations of the petition. The Iowa court interpreted these admitted allegations in the light of the Iowa practice and procedure, and of the following provisions of the Iowa Code:

Section 2922 of the Code of Iowa, provides that "In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereto."

Section 4045 of the Code of Iowa, provides that, "The debtor may redeem real property at any time within one year from the day of sale, and will, in the meantime, be entitled to the possession thereof."

Section 4054 of the Code of Iowa, provides that,

"Unless the defendant redeems, the purchaser, or the creditor who has last redeemed prior to the expiration of the nine months aforesaid, will hold the property absolutely."

Section 4062 of the Code of Iowa, provides that,

"If the debtor or his assignee fails to redeem, the sheriff

then in office must, at the end of the year, execute a deed to the person who is entitled to the certificate as hereinbefore provided, or to his assignee."

In Iowa, therefore, the purchaser's right to a deed and possession first accrued one year after the foreclosure sale. The fact, but not the date of this sale appears, but this sale must have been at least one year prior to the taking of possession, which is alleged to have taken place May 31, 1894. The Iowa court concludes: "This action was begun October 7, 1896, and at that time the plaintiff's cause of action was barred."

While the Iowa court, as an aid to the interpretation of the allegations of the petition held in mind the Iowa practice and procedure and the foregoing provisions of the Iowa Code, nevertheless, the Iowa court had recourse, if at all, only to Iowa, and not to Federal law as an aid to its interpretation and construction of the fact established by the admitted allegations of the petition on demurrer, and its finding that the usurious transaction, if any, occurred "more than two years prior to the commencement of this action" (Record p. 32) is a conclusion of fact drawn from the allegations of the petition explained by presumptions arising from the aforesaid sections of the Code of Iowa.

The mere application of section 5198 of the Revised Statutes of the United States to this established fact does not present a case in which a Federal statute is drawn into question.

If these contentions are well taken, then there is no Federal question involved.

This court has no jurisdiction of this case on error, because the allegations of the petition in error fail to show that the controversy was determined or determinable by one of two or more conflicting constructions of the Federal statute, but do affirmatively show that the action was determinable and determined on a mere question of fact in which the meaning, con-

struction or validity of the Federal statute was not drawn into question. To give this court jurisdiction, on this writ of error, it must appear by apt allegations not only that the application of the Federal statute was involved, but that the controversy was actually determined by a construction put upon the Federal statute adverse to the contention of the plaintiff in error.

Blackburn vs. Portland Gold Mining Co., 175 U. S., 571, 585-6.

Shoshone Mining Co., vs. Rutter, 177 U. S., 514.

Respectfully submitted,

ASA F. CALL,

HENRY J. TAYLOR,

Associate Counsel for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 190.

DANIEL H. TALBOT,
Plaintiff in Error,

vs.

THE SIOUX NATIONAL BANK OF SIOUX CITY, IOWA.

BRIEF FOR DEFENDANT.

STATEMENT.

The motion to dismiss the writ of error in this cause for want of jurisdiction, being now under advisement by this court, it is unnecessary to repeat the full Statement of the case made in the brief for defendant on said motion.

The original action was begun in the District Court of Woodbury County, Iowa, by petition filed October 7, 1896. Plaintiff, having been required by the court to amend, filed his amended petition May 20, 1897, containing three counts. The third count of the amended petition was dismissed by the court for failure to make it more specific, and the complaint therein contained is no longer in controversy (Record, p. 22). The first and second counts set forth what purports to be a single cause of action. A demurrer was sustained to these two counts by the District Court of Woodbury County (Record, p. 21), and on appeal to the Supreme Court of Iowa the cause of action was construed as one for the recovery of usury under Section 5198 of the Revised Statutes of the United States. On the ground that it appears in the petition that the action was not commenced within two years from the time of the alleged usurious transaction, the Supreme Court of Iowa affirmed the judgment of the lower court (Record, p. 32).

It is sought, by a writ of error from this court to the Supreme Court of Iowa, to reverse the judgment of that court on the ground that said judgment was erroneously rendered against the right of plaintiff claimed under Sections Nos. 5197 and 5198 of the Revised Statutes of the United States (Record, p. 33).

ARGUMENT.

Plaintiff's cause of action is so obscurely stated that it is difficult to ascertain exactly of what he complains. It is clearly enough alleged that he borrowed money from The Sioux National Bank of Sioux City, Iowa, the defendant, from time to time, up to March 1, 1890. It is not alleged directly or inferentially that any money was, at any time, voluntarily *paid* by plaintiff to the Bank. Usurious interest was included in the several notes and renewals. About February 24, 1890, plaintiff gave his note to the Bank for $10,000.00, which included usurious interest, and would have been due June 30, 1890. This note, it is alleged, "was a renewal of past and prior indebtedness of plaintiff and included, continued and contained *all* of the illegal and usurious interest charged prior thereto by defendant against the plaintiff" (Record, p. 10, par. 3). About March 4, 1890, plaintiff executed to the Bank a new note covering all his indebtedness, including the $10,000.00 note of February 24, 1890, and "the unlawful and usurious interest knowingly reserved and charged" prior to March 4, 1890 (Record, p. 10, par. 5).

In the first count of the amended petition it is alleged that this $28,000.00 note, embracing all the illegal interest which defendant had agreed to pay, was "put in a pretended judgment against plaintiff." The amount for which judgment was rendered does not appear. It is alleged that the "forfeited interest which has since *incurred* amounts in all to about nine thousand dollars" (Record, p. 11, par 9).

The second count of the amended petition sets forth the additional facts that a mortgage was given to secure

the note for $28,000.00; that on account of usury embraced in the note there was no interest legally due from plaintiff to the Bank. That before the principal became due and while the interest was, on account of its illegality, only due upon the face of the paper, the officers and attorneys of the Bank "delivered said note and mortgage to one J. W. White," who brought a suit to foreclose the mortgage on the sole ground of non-payment of interest. It is alleged that White and the officers and attorneys of the Bank, by a conspiracy, concealed from the court the fact that the note embraced usury, and obtained a judgment of foreclosure by sale of the mortgaged premises to satisfy a judgment for the full amount of the note, principal, usurious interest and attorney's fees (Record, p. 14, par. 8). It is alleged that under this judgment of foreclosure the mortgaged premises were sold and possession was taken by said White on or about May 31, 1894 (Record, p. 15, par. 11).

There is no allegation whatever as to the amount for which the premises were sold.

The mortgage is attached to, and made part of, the petition (Record, p. 10, par. 6), and in the mortgage it is provided that upon failure to pay interest "both principal and interest shall at once become due and collectible." (Record, p. 19, last par.)

The only relief demanded by plaintiff upon either count of his amended petition is a judgment for money, and an order permitting him to examine the books, etc., of the bank.

The most apparent claim of plaintiff upon either count of his petition is, that he has been injured by the judgment of a court of competent jurisdiction rendered upon a cause of action to which he had a legal defense. Why the defense was not interposed is not stated. That he had not full notice

of the action is not intimated. There is no hint that he was prevented in any way from asserting his full rights in the court when he was sued. If there was no service upon him, or any defect in the jurisdiction, the judgments are absolutely void and he can recover his land in a simple action of ejectment.

It is evident, however, that whatever wrong may have been done to plaintiff by reason of a judgment rendered against him by a court, either upon an insufficient cause of action, or by reason of the plaintiff in the wrongful action, concealing a defense that might have been interposed, no federal question is involved in such a wrong. If an independent suit can be maintained against a party under any circumstances, for obtaining and enforcing a judgment, it is clear that the cause of action is the fraud of such party practised upon the court. If the plaintiff, Daniel H. Talbot, is seeking judgment against The Sioux National Bank because it fraudulently procured the State Court to enter a judgment against Talbot upon a pretended cause of action, it is entirely immaterial what the pretense was that induced the court to act. A claim against a judgment creditor for *falsely pretending* that he had a good cause of action under the laws of the United States, or for *falsely concealing* that the judgment debtor had a good defense under such laws, raises no federal question under Section 709 of the Revised Statutes of the United States.

If plaintiff in error were in this court seeking to reverse the original judgment obtained against him by J. W. White, he would fail on the ground that this court can review the judgment of a state court only when the right, privilege or immunity claimed under the Constitution or any treaty or statute of the United States was specially

set up or claimed in the state court at the proper time and in the proper way.

Chappell vs. Bradshaw, 128 U. S., 132.
Leeper vs. Texas, 139 U. S., 462.
Spies vs. Illinois, 123 U. S., 131.
Re Buchanan, 158 U. S., 31.
Winona & St. Peters L. Co. vs. State of Minnesota, 159 U. S., 540.

This being so, it is clear that plaintiff raises no federal question by an action based upon the wrongful obtaining of a judgment which could not be directly reviewed in this court after affirmance by the highest court of the state.

Whatever may have been plaintiff's theory of his rights when he instituted his suit, it is now apparent that he claims the right to a judgment against The Sioux National Bank *directly* under Sections 5197 and 5198 of the Revised Statutes of the United States (Record, p. 33, Petition for Writ of Error). The sole question, therefore, is, does the amended petition of plaintiff state facts sufficient to entitle plaintiff to recover a judgment against defendant under the said sections? The Supreme Court of Iowa decided that the amended petition is not sufficient, and assigned one reason for its judgment. It is respectfully submitted that the judgment of the Supreme Court of Iowa is right for the reason assigned by the court and for two other equally valid reasons which might have been given.

First. Section 5197 of the Revised Statutes of the United States provides what interest may be lawfully taken or reserved by a National Bank and is as follows:

"Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of ex-

change, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this Title. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days from which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.".

Section 5198 provides the remedy where usurious interest is taken, etc., and is as follows:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred."

The remedy provided by this Section is exclusive in all usurious transactions with National Banks. No state laws apply. It covers every form of the transaction, those in

which usury is promised and those in which it has been paid. The first clause provides a remedy where the usury is promised, either expressly or by reservation, at the time of discount. It applies only where the bank seeks to recover of the borrower, and can have no application to a suit by the borrower to recover of the bank.

Farmers and Merchants Nat. Bank vs. Dearing, 91 U. S., 32.

Brown vs. The Second Nat. Bank of Erie, 72 Pa. St., 209.

In the latter case, Judge Sharswood, after reciting the first clause, says, "this has evident reference to the enforcement of the contract by judicial process, in which case it is provided that it shall be held and adjudged that the bank shall forfeit the entire interest—that is, shall recover only the sum actually loaned or advanced without any interest at all. There is a marked difference in the language of the clause which follows and which makes provision for the case where the usury had been consummated by the actual receipt by the bank of the usury."

And in Barnet vs. Muncie Nat. Bank, 98 U. S., 855, Mr. Justice Swayne, referring to the last clause of Section 5198, says, "The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the redress, and both provisions are alike obligatory on the parties."

Plaintiff's rights, therefore, must be enforced by the remedy prescribed by the last clause of Section 5198. It is made an express condition in this clause that the action shall be brought within two years. The language is, "provided such action is commenced within two years from the time the usurious transaction occurred." The amended

petition shows that the last dealing between plaintiff and the bank was on March 4, 1890, at which time the usurious note of $28,000.00 was given (Record, p. 12, par. 2). Judgment was rendered on said note May 6, 1891 (Record, p. 14, par. 8). The purchaser of the land, sold under the foreclosure judgment, took possession May 31, 1894 (Record, p. 15, par. 11). This terminated all the transactions until plaintiff filed his notice of intention to file his petition, August 29, 1896 (Record, p. 3). The petition was filed October 7, 1896.

It is obvious, therefore, that whatever the words "usurious transaction" may mean, the action was not commenced within two years from the time the usurious transaction occurred and fails by the very terms of the statute. For this reason the Supreme Court of Iowa said, "This action was begun October 7, 1896, and at that time the plaintiff's cause of action was barred, and the demurrer for that reason was properly sustained."

In his assignment of error, plaintiff seeks to evade the result of his laches by alleging that "it appears in said petition that the charges of illegal interest made against plaintiff in error by the defendant bank were made from time to time without his knowledge or consent that such transactions were fraudulently concealed from the plaintiff in error, and that knowledge of the same was not obtained by him until within two years prior to the commencement of the suit by the plaintiff in error" (Record, p. 34).

A careful reading of the petition fails to disclose any of these allegations, except that the interest was reserved and charged without the knowledge or consent of plaintiff. Even if plaintiff had alleged how the usurious transactions were fraudulently concealed from him (a state of facts difficult to imagine) and how and when they were discovered

by him, it would not affect the terms of a penal statute prescribing the time within which suit must be brought. If moneys were fraudulently obtained from plaintiff by the bank, whether usury or not, an action for recovery would lie. But when plaintiff seeks the special remedy of a penal statute, he must comply with its conditions.

Secondly, it does not appear that any usury was ever, directly or indirectly, paid by plaintiff to the bank. The petition shows that usury was reserved in the note; that the note was secured by mortgage, and that by foreclosure of the mortgage the property embraced therein was sold to pay the note. Neither the value of the land nor the amount for which it was sold is stated. From no allegations can it be inferred that the note was paid in full. While it appears that foreclosure suit was brought solely on the ground of non-payment of interest, yet by the terms of the mortgage the principal sum became due when the interest was not paid and judgment was in fact rendered for the full amount of the note, principal and interest. The most that can be claimed for plaintiff is, that, as the entire interest was forfeited, and the principal not therefore due, judgment was rendered for the principal debt before its maturity. It may be conceded that this would have been error if plaintiff had interposed usury as a defense. Nevertheless, when the land was sold for the payment of the judgment, the proceeds were legally applicable to the payment of the valid part of the debt, the principal, and not to the illegal part, the interest, and it must be presumed that the proceeds were so applied. It is conceded that there was a just debt amounting to $14,874.60 (Record, p. 12, par. 2), for which judgment was, in fact, rendered. Suppose the land was sold for $10,000.00 (a supposition entirely consistent with the al-

legations of the petition) and so much of the principal of the debt was extinguished, what wrong has plaintiff suffered?

The principle of law is well settled that when a general payment is made upon a note embracing usury, the payment is applied to the extinguishment of the principal of the debt rather than to the payment of the illegal interest.

McBroom vs. Scottish Mortgage and Land Investment Co., 153 U. S., 318.
Stevens vs. Lincoln, 7 Met. (Mass.) 525, 528.
Saunders vs. Lambert, 7 Gray, 484, 486.
Harvey vs. Insurance Co., 60 Vt., 209.
Kendall vs. Crouch, 88 Ky., 199, 202.
Smith vs. Robinson, 10 Allen, 132.
Hawkins, vs. Welch, 8 Mo., 490, 492.
Hale vs. Bank, 30 Neb., 99, 102.
Jackson vs. Garner, 79 Ga., 415.
Wright vs. Laing, 3 Barn. & Cres., 165, 168.
Bank of Cadiz vs. Slemmons, 34 Ohio St., 142.

A corollary of this proposition is, that the lender is not liable to an action for the penalty prescribed by statute for taking usurious interest so long as the principal debt, after deducting all payments, remains unpaid.

Before plaintiff can claim the penalty for usury *paid*, when he relies upon a general payment, he must show that such payment was more than sufficient to extinguish the valid part of the debt.

In the case of McBroom vs. Scottish Mortgage and Land Investment Co., 153 U. S., 318, a statute of New Mexico, similar to the National Banking Act, received consideration by this court. The only material difference

between the statutes is that the statute of New Mexico declares only the *excess* of legal interest forfeited instead of the whole interest. The suit was one to recover the penalty for usury paid. Several usurious notes were given for the interest, separately from the principal note. One of the usurious notes had been paid in full. Mr. Justice Harlan, delivering the opinion of the court, says, p. 328, "The borrower has no cause of action until usurious interest has been actually collected or received from him. Such is the mandate of the statute. And interest can not be said to have been collected or received in excess of what may be lawfully collected and received until the lender has in fact, after giving credit for all payments, collected or received more than the sum loaned, with legal interest." Omitting the last three words of the quotation (applicable to the New Mexico Statute alone, on account of the difference above mentioned) the authority is exactly in point.

In Stevens vs. Lincoln, 7 Metc., 525, the court said, "And, in the absence of proof as to any appropriation of a partial payment, the law will apply a payment to the valid demand rather than to the illegal one; and the balance which remains unpaid, if it exceeds the usury agreed to be paid, includes the usury, so that, on one side, the debtor shall not recover back any part of that which he honestly owed, by the allegation on his part that the payment made by him was the payment of the usury, nor on the other hand will the law permit the creditor to secure to himself the avails of his illegal contract, and, when he sues for the balance due on the contract, to aver that the usurious interest was contained in the previous payment, and that the residue is justly due."

The judgment of the Supreme Court of Iowa, affirming the judgment below was, therefore, correct for the additional reason that the petition fails to show that any usury was paid.

Thirdly, the plaintiff is estopped to allege that the note for $28,000.00 embraced usury by the very judgment of which he complains. If the note embraced usury it was valid only for the amount of the principal without interest. The court adjudged that the full amount of the note, principal and interest, was due. The petition does not allege whether or not usury was pleaded as a defense, but that is not material. The fact that the whole amount was legally due is conclusively established by the judgment, which can not be collaterally attacked.

In Hopkins vs. West, 83 Pa. St., 109, the lender had obtained judgment against the borrower upon a note, including usurious interest. The borrower paid the judgment and sued to recover the usury. Mr. Justice Sharswood, delivering the opinion of the court, says, page 110, "There is no difference in legal effect between a judgment confessed, or for want of appearance or plea, and a judgment on the verdict of a jury. * * * No substantial difference can be shown between this (usury) and any other illegality entering into its consideration. The judgment in favor of Hopkins, Wright & Co. against West would, no doubt, have been opened upon his application, and the excess beyond legal interest would have been stricken from it. But standing as it did upon the record and paid by West in full, he can not be permitted now to go behind it and claim that part of it was not due, either from usury or any other cause."

This case is followed and approved in Montagu vs. McDowell, 99 Pa. St., 265, and the same principle is held in Kearney vs. First National Bank, 129 Pa. St., 577.

In Heath vs. Frackleton, 20 Wisc., 338, where the judgment debtor brought a suit to recover the usury collected by foreclosure and sale of premises, it was held that

the judgment was a bar. Mr. Chief Justice Dixon says, p. 340, "It is an elementary principle that every such judgment, unless impeached for fraud, is so far absolutely conclusive upon the parties to it. To maintain this action, the plaintiff must go behind the judgment and show that the whole sum for which it was rendered was not due and owing, and also that the notes and mortgage as to the sum of $1,000 and all the interest, purporting to have been secured by them, were void for usury. No plainer case within the rules of estoppel by judgment can be imagined."

In Steward vs. Downer, 8 Vt., 320, which was an action by an informer to recover a statutory penalty for usury, the payment of which had been enforced by a foreclosure sale, the court held that there could be no recovery when the payment was by operation of law; also that the judgment was *res judicata* as to usury. On the latter point, Judge Redfield says, "This decree is to all intents a judgment, and as between the parties to the judgment, every defense as to the original suit is forever put at rest. The validity of the judgment can not be again examined. The usury is as effectually purged as if the parties had by agreement deducted the excess of interest from the security, which has always been held to purge the usury."

Section 5198 gives a right to the borrower to repudiate the entire interest when it is tainted with usury. No matter how many promises to pay have been executed by renewal notes such promises are not payments. He has a valid *defense* to the whole of the last renewal note, excepting to the extent of the original sum borrowed without interest.

Brown vs. Marion Nat. Bank, 169 U. S., 416.

From *payment* by the borrower an entirely different right arises under Section 5198—the right to the penalty

if suit is brought within two years from the payment. The statute does not give the borrower an option *either* to plead usury as a defense, *or* to permit the principal and interest to be collected by judgment and execution, and then to sue for the penalty. Obviously when the statute gives a penalty for interest "paid" it means voluntarily paid. It can not mean interest collected by a suit at law in which the validity of the note, that is to say, whether it embraces usury or not, is the very matter in issue between the parties. Such a construction would encourage litigation. It would encourage the borrower not to interpose usury as a defense, but to permit judgment to be entered and collected, and then to bring suit to recover twice as much as he would have saved by a defense. This is not a reasonable construction of a penal statute. "Paid" means voluntarily paid, not collected by law.

Steward vs. Downer, 8 Vt., 320.

For the additional reason, therefore, that plaintiff is estopped by the judgment he has pleaded to allege that the note on which the judgment was founded, embraced usury, the judgment of the Supreme Court of Iowa should be affirmed.

There is high authority for the proposition that a borrower from a national bank can not maintain an action under Section 5198 to recover a penalty for usury until he has paid, or offered to pay, what he rightfully owes.

Hazeltine vs. Central Nat. Bank, 155 Mo. 66.

It is unnecessary for us to contend for so broad a principle, but it is certainly inequitable to permit a borrower

who has paid nothing, and who has been adjudged by a court of competent jurisdiction to owe a certain amount part only of which has been collected, to maintain a suit for a penalty without showing that any part of the obligation which he admits to be valid, has been satisfied.

Respectfully submitted,

FRANCIS F. OLDHAM,

Attorney for Jonathan W. Brown,
Receiver of The Sioux National
Bank of Sioux City, Iowa.

August 1, 1901.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1901.

NO. 190.

DANIEL H. TALBOT,
PLAINTIFF IN ERROR,
vs.
SIOUX NATIONAL BANK, OF SIOUX CITY, IOWA,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Iowa.

Brief of Associate Counsel for Defendant in Error.

STATEMENT.

What the Plaintiff in Error Claims.

Plaintiff in error restates his entire claim in count second of his amendment to petition. (Record, pp. 12-15.)

He states that in March 1890, he delivered to the defend

ant his note for $28,000, and alleges that said note included an actual indebtedness of $14,874.60, and that the remainder, $13,125.40, represented interest, which he terms "unlawful and forfeited interest" by virtue of offending against sections 5197 and 5198 of the Revised Statutes of the United States.

He further alleges that said $28,000 note was secured by a mortgage upon certain real estate of the plaintiff in error situated in Plymouth County, Iowa, which mortgage was duly recorded on March 5, 1890. He alleges that the fact that there was usurious interest reserved in said $28,000 note was known to the defendant, its officers, attorneys and to J. W. White, the actual holder of said note.

He alleges that the principal debt was not due except under the provision maturing the principal upon default in interest, and contends that said sections of the federal statutes forfeited the interest and rendered the principal "non-interest bearing," and, therefore, that default in the usurious interest could not be made the basis for maturing the principal indebtedness. He alleges that the court had no jurisdiction to try and hear said suit or render decree therein for the reason that whatever valid indebtedness there was had not matured, and alleges further that the defendant was guilty with said White, the holder of the mortgage, in concealing this alleged usury from the court, but does not allege that it was concealed from himself.

He alleges that without his knowledge or consent there was more than $1.00 of usurious interest included in the renewal notes, that were assembled in this $28,000 note, but does not allege that he was without knowledge of all reservations of usury therein. Evidently he did not set up in the state court a de-

fense under the first clause of section 5198 and seek thereby to limit the recovery to the actual amount of money loaned, exclusive of all interest, as he was entitled to do under this federal statute if his defense of usury had been maintained. Or if he did, his defense was not sustained by the court. He was made a party to the foreclosure suit, and it may be inferred that he chose to let the judgment go for the full amount of the indebtedness with interest rather than attempt to take advantage of the first clause of section 5198, possibly under the idea that he would be able to recover back under the second clause at a later time twice the amount of interest actually included in the judgment, greatly to his profit.

He further alleges that judgment in said foreclosure proceedings was rendered on the 6th day of May, 1891, in said state court for $31,086.50, which he alleges included said "forfeited interest," a term used by him to designate all interest upon the actual principal loaned. He then alleges that "said lands were afterwards sold on said execution to satisfy said judgment" and were bid in by one of the directors of said bank, and that the sheriff's deeds under said foreclosure sale have been duly recorded in Plymouth County, Iowa, in the manner required by law. It does not appear in the allegations of plaintiff in error that the property sold for enough to satisfy *in full* the said judgment or even to satisfy the same to the extent of $14,874.60, which is admitted to have been a valid principal indebtedness, exclusive of all interest. Unless this paragraph 8 (p. 14) is construed to involve a satisfaction of the usurious part of the judgment the plaintiff in error has made no pretense of payment of any usurious interest.

In paragraph 9 he alleges that the state court was imposed upon in including "forfeited interest" in the decree, and that the decree should have been for no more than the principal indebtedness exclusive of all interest.

He further alleges that said principal indebtedness had lost its "interest-bearing power" by reason of usury being reserved in said $28,000 note, and, therefore, the indebtedness had not in fact become due, and "said judgment, decree of foreclosure, the issuance of the execution on said judgment, and the making of the sheriff's deed aforesaid, were and are illegal and void." We presume he means that the judgment should not have included this "forfeited interest," and, further, that it should not have been rendered at that time because the "forfeited interest" provisions were not sufficient to mature the original indebtedness. If he means that all these proceedings are to be considered by this court as "illegal and void," it would be difficult to see just how he has been hurt thereby.

In the next paragraph he alleges that the holder of the note and mortgage and the defendant in error without the knowledge or consent of the plaintiff in error took forcible and wrongful possession on or about May 31, 1894, of the said real estate, and has held such possession ever since causing the plaintiff in error to "sustain damages by being deprived of the use and occupation and benefits of said premises and the reserving and charging of the unlawful and usurious interest heretofore mentioned in the approximate sum of $31,000." Unless he means that this possession was taken under the authority of the sheriff's deed in the foreclosure proceedings, we do not discover its pertinency to this action.

He finally demands judgment for twice $13,125.40 "as a penalty provided for by sections 5197 and 5198, Revised Statutes of the United States, together with the interest thereon."

To sum up the indefinite claim of the plaintiff in error, we state that it seems clear enough that he is endeavoring to gain something under the second clause of section 5198, being the punishment clause for the *payment* of usury. He nowhere alleges payment of any usury. He does not even allege that the defendant in error collected on execution sale the judgment in foreclosure in an amount that would reimburse it for even the original and admitted principal indebtedness, exclusive of all interest. Unless the court shall interpret the allegations of the defendant in error to mean that under, by and through the foreclosure sale of the real estate the defendant in error was enabled to collect that part of the judgment which the plaintiff in error asserts was for "forfeited interest," we do not see where a plausible claim can be made by the plaintiff in error to the effect that he has ever *actually paid* one cent of usury.

The last dealing between plaintiff and the bank was the giving of the $28,000 note and mortgage on March 4, 1890, (p. 12, par. 2). The suit to foreclose this note and mortgage was begun April 9, 1891 (p. 13, par. 7). Decree in foreclosure was rendered on May 6, 1891 (p. 14, par. 8). Execution was taken out, a sale made and sheriff's deed delivered. Possession was taken on May 31, 1894 (p.15, par. 11). The original notice was served herein on August 26, 1896, and the petition filed on October 7, 1896. The exact dates of the sale and of the sheriff's deed are not given. From the Iowa statutes, set out in brief of associate counsel for defendant on motion to dismiss or affirm,

it is manifest that the sale took place more than three years prior to the commencement of this action. The lower state court sustained the bank's demurrer to the petition on many grounds and the supreme court construed the action as one to recover the penalties under the second clause of section 5198 and found *as a fact* that the usurious transaction, if any, occurred "more than two years prior to the commencement of this action," and that, therefore, this action was barred by the very terms of section 5198 itself.

ARGUMENT.

I.

No Federal Question is Presented.

This proposition was argued in the brief of associate counsel filed herein on January 3, 1901, on motion to dismiss or affirm, and we now make that brief a part of this argument by this reference thereto, citing one additional case:

Avery vs. Popper, 179 U. S., 315.

II.

The Judgment of the State Court is Right.

The supreme court of Iowa drew from the pleadings of plaintiff in error, interpreted in the light of the law, practice and procedure of Iowa, the conclusion of *fact* that the alleged usurious transaction, if any, occurred "more than two years prior to the commencement of this action," and therefore held

" this action was begun October 7, 1896, and at that time the plaintiff's cause of action was barred."

Counsel for plaintiff in erorr in their brief (p. 6) on motion to dismiss or affirm admit that "the payment of this note was secured by a real estate mortgage under which foreclosure proceedings were subsequently had, and a judgment in foreclosure entered *resulting in a sale of the lands and the taking possession thereof by the bank on or about May 31, 1894.*"

Section 4055 of the Code of Iowa gives the mortgagee the right of possession during the one year of redemption from the day of sale, after which the purchaser at the sale (section 4054) "will hold the property absolutely." Section 4062 provides that the sheriff's deed issue only at the end of one year after the sale. These sections are quoted in full in our brief on the motion to dismiss. It follows, therefore, that possession could not have been taken by the purchaser until the expiration of the year of redemption, and it follows that possession having been taken under said sale on May 31, 1894, the sale itself must have been at least as early as May 31, 1893. At any rate, the usurious transaction, if any, had occurred as early as the admitted date of taking possession, to-wit: May 31, 1894, which is more than two years prior to the commencement of this action. Indeed, this matter is placed beyond contention by the further admissions of opposing counsel in their brief on the motion (p. 3) in the following language: "That thereafter (meaning after the decree in foreclosure, May 6, 1891) the said lands were sold to satisfy said judgment, and on or about May 31, 1894, the same were taken possession of by defendant and one White," an ad-

mission that the sale took place prior to May 31, 1894, as found by the supreme court of Iowa. (Record, p. 32.)

In our brief on motion to dismiss or affirm, the Iowa law is set out and shows that a proper interpretation of the allegations of the petition conclusively establishes the correctness of the judgment of the state court. This court should reach the same conclusion, if indeed, it is not bound thereby.

Abraham & Son vs. Casey, 179 U. S., 218.

III.

United States Rev. Stat. Sec. 5198 in its second clause creates an entirely new liability of a penal nature with the right to an action for its enforcement, "Provided such action is commenced within two years from the time the usurious transaction occurred," and this special limitation acts directly upon the penal liability as well as upon the remedy therefor.

This section 5198 contemplates two distinct classes of actions: *First*, those wherein usurious interest "has been *agreed to be paid* thereon;" *second*, those wherein usurious interest "has been *paid.*"

The plaintiff in erorr seeks no relief under the first clause of said section, but manifestly limits himself to his right, if any, to relief under the second clause of said section. Usurious interest is not "paid" merely because it is included from time to time in renewal notes. Such renewal notes would involve only

the *promise* of usurious interest. The second clause contemplates *actual payment*, which alone can be made the basis of an action to "recover back * * * twice the amount of interest thus paid."

Haseltine vs Central Nat'l Bank, 183 U. S.

National Bank vs. Ragland, 181 U. S., 45.

The time within which the action must be brought operates as a limitation of the liability itself as created and not of the remedy alone. It is a condition attached to the very right to sue. Time is made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitation of the remedy is to be treated also as a limitation of the right.

The penalties of this statute are lost at the expiration of the two-year period, and cannot be prolonged by undiscovered or concealed fraud.

This penality for usurious interest paid is created anew and solely by this statute, which contains its own special limitation. Time is of the essence of the right created and the limitation is an inherent part of the statute so that there is no right of action independent of the limitation. Such special limitation extinguishes the right absolutely in two years. Analogous cases may be cited:

The Harrisburg vs. Rickard, 119 U. S., 199, 214.

"A wide distinction exists between pure statutes of limitation and special statutory limitations qualifying a given right. In the latter instance time is made an essence of the right created and the limtation is an inherent part of the statute or agreement out of which the right in question arises, so that there is no right

of action whatever independent of the limitation. A lapse of the statutory period operates, therefore, to extinguish the right altogether. To such limitations the rules of law governing pure statutes of limitation, applicable to all classes of actions, have no application.

"Where time is of the essence of the right created, and the limitation is an inherent part of the statute or agreement under which the right in question arises, so that there is no right of action independent of the limitation, such special limitation extinguishes the right rather than affects the remedy."

19 Am. & Eng. Ency. of Law, pp. 150-151,

citing the following cases:

Bartlett vs. Manor, 146 Ind., 621.

The Harrisburg, 119 U. S., 199.

Finnell vs. Southern Kansas R. Co., 33 Fed. Rep., 427.

Hudson vs. Bishop, 35 Fed. Rep., 820.

Spicer vs. Hockman, 72 Ind., 120.

Potts vs. Felton, 70 Ind., 166.

Taylor vs. Cranberry Iron, etc., Co., 94 N. C., 525.

Smith vs. Tripp, 14 R. I., 112.

See also:

Palen vs. Johnson, 50 N. Y., 49 (a usury case).

Savings & Trust Co. vs. Bear Valley Irr. Co., 89 Fed. Rep., 38.

A., T. & S. F. R. R. Co. vs. Tanner, 19 Colo., 564; 36 Pac. Rep., 541, 543.

Goodwin vs. Cunningham, 54 Neb., 16; 74 N. W. R., 316.

Lambert vs. Ensign Mfg. Co., 42 W. Va., 817; 26 S. E. R., 431-2.

McCartney vs. Potomac Elec. Co., 94 Va., 203; 26 S. E. R., 421.

Hoover vs. Ry. Co., 46 W. Va., 270; 33 S. E. R., 224.

IV.

The two year period of this statute cannot be extended by any engrafted qualification for fraud concealed or newly discovered.

Referring to such special statutory limitations qualifying a given right, the law is thus stated:

"They are not subject to the disabilities and excuses through which the effect of ordinary statutes of limitation may be avoided, nor, it seems, can they be evaded even by proof of fraud."

19 Am. & Eng. Ency. of Law, p. 151.
Taylor vs. Coal Co., 94 N. C., 525.
Suggs vs. Ins. Co., 71 Texas, 579; 9 S. W. R., 676.
Cochran vs. Young, 104 Pa. St., 333.
Luther vs. Luther, 122 Ill., 558; 13 N. E. R., 166.
Spicer vs. Hockman, 72 Ind., 120.
Potts vs. Fulton, 70 Ind., 166.

The plaintiff in error invokes a penal statute, and must bring himself clearly within the provisions thereof. Admittedly he has failed to do this. In their brief on motion to dismiss or affirm, counsel for plaintiff in error seek to engraft upon this penal statute a qualification that fraudulent concealment will prevent the running of the statute until the discovery of the

fraud. Defendant in error denies the right to engraft such a qualification upon this penal statute. This is not a general statute of limitation. There was no such penal liability at common law. This statute creates a new legal liability, which liability itself as created expires by the express limitation of this penal statute. The liability and the remedy are created by the same penal statute, and the expiration of two years forfeits this new legal right. The limitation is a condition attached to the liability itself. In said brief counsel for plaintiff in error concede (p. 7) that this action was not brought within two years from the time the usurious transaction occurred, and the supreme court of Iowa expressly so found, but counsel further seek to evade this limitation by the further contention that the two years should not commence to run until Talbot actually discovered the alleged usury. But if this statute is not a general statute of limitation but rather a penal statute calling for strict construction, and if time is of the essence of the newly created right as well as of the remedy, then the right ends in two years and the remedy cannot be prolonged by any engrafted qualification. The very statute that creates this new penalty fixes its duration, and the court should not continue the period of this penalty beyond the terms of this penal statute.

The Harrisburg vs. Rickard, 119 U. S., 199, 214.

Newburn vs. Bass, 82 Ala., 622, 2 So. Rep., 520.

See also cases cited *supra.*

Counsel for plaintiff in error in their brief on motion to dismiss or affirm seem to regard this as a general statute of limitation, and cite only one case, Pearsall vs. Smith, 149 U. S., 236, which has no application to the penal statute under con-

sideration, for the reason that the second clause of section 5198 is not a statute of limitation of the remedy alone, but a limitation of the penal liability itself thereby created. It avails nothing to extend a remedy if the liability has expired.

V.

Even if the position of counsel for plaintiff in error were correct, plaintiff in error could avail himself only of concealment by the defendant in error without fault or negligence or laches on the part of the plaintiff in error.

Plaintiff in error was a party to the foreclosure suit, and must be presumed to have followed that suit with notice of each successive step taken therein, including the sale, deed and the assumption of possession thereunder, because these are the ordinary and usual steps in foreclosure proceedings. At any rate having been properly brought into court in the foreclosure proceedings, the plaintiff in error as against collateral attack will be held estopped under the doctrine of laches from saying that he did not have knowledge of or that the defendant concealed from him those completing steps in the foreclosure proceedings that were ordinary, natural, timely and necessary in making the foreclosure itself effective. These steps were to be expected. The decree should be conclusive upon the plaintiff in error who should not now be permitted to invoke his own laches as a basis for this action. There is no allegation that defendant concealed plaintiff's cause of action.

Pearsall vs. Smith, 149 U. S., 236.

It seems to be the law that usury is as effectually purged by judgment as by a remission of all tainted interest prior to judgment, at least as against a collateral attack.

Stewart vs. Downer, 8 Vt., 320.

VI.

The allegations of plaintiff in error touching fraudulent concealment are only conclusions of law instead of statements of ultimate facts, and, therefore, cannot avail the plaintiff in error.

Surely it is not within the proper scope of this action to set aside the judgment of foreclosure for any fraud alleged to have been practiced upon the court by the plaintiff therein whether abetted by the defendant in error or not. Such is not only not a federal question, but is not a question of any kind upon the record that any court has ever been asked to decide. We may say that in a suit for relief against a judgment containing usury the debtor would probably be compelled to repay the legal debt as a condition of any relief. Plaintiff in error offers no excuse for not discovering the fraud sooner if, indeed, he does not admit knowledge of some usury from the beginning. He states no facts. On demurrer, statements of legal conclusions cannot avail. 12 Ency. Pldg & Prac., p. 1030, and following.

VII.

Plaintiff in error does not allege that he actually paid any usurious interest.

Section 5198 does not contemplate that the debtor may be a

party to the foreclosure proceedings and silently permit such proceedings to go into judgment for principal and interest, and then claim that the amount bid at the execution sale was larger than the original principal, exclusive of all interest, and, therefore, that under and by the execution sale itself he has paid usurious interest. The statute does not contemplate that a party to the foreclosure proceedings, decree and sale can forego his defense of usury therein and more than two years later collaterally assail the foreclosure sale itself as a usurious transaction through which he paid usurious interest. Such a contention regards not the solemnity of court proceedings culminating in decree, execution, sale and deed. The judgment of a competent court with or without the defense of usury, unappealed from and not directly assailed, should estop the plaintiff in error from claiming that the execution of that judgment resulted in the payment of usurious interest. This action is not available to the plaintiff in error to set aside that decree, and in the absence of some proper proceedings to set aside that decree in foreclosure, the collection thereof should not be held an offense against any federal statute. Money collected on such a decree is not money "paid" for the purpose of a collateral attack under the penal statute under consideration.

Steward vs. Downer, 8 Vt., 324.

VIII.

While the allegations of plaintiff in error show a decree in foreclosure, sale, execution, deed and assumption of possession thereunder, they do not show that there has been "paid" on the

decree an amount in excess of the admittedly valid principal indebtedness exclusive of all interest. There is no presumption that the bid exhausted the judgment. If the taking of any interest offended a statute of usury, then the bid should be applied upon the valid principal until at least that principal was paid out, and there is no showing that the property was worth or sold for an amount sufficient to pay out the admittedly valid original indebtedness, exclusive of any interest, legal or illegal.

McBroom vs. Scottish Mortgage & Land Investment Company, 153 U. S., 318.

IX.

The decree in foreclosure cannot be thus collaterally assailed.

The plaintiff in error had his day in court in the foreclosure suit. The decree of the court in that suit to which he was a party should be held an estoppel against his assertions in this action. Until he has by proper steps set aside that decree he is not in a position to avail himself of contentions in this action which indirectly destroy the integrity of that decree. Plaintiff in error relies much on Brown vs. Marion Nat'l Bank, 169 U. S. 416. Whatever that case might have availed the plaintiff in error in the foreclosure proceedings in the state court under proper issues has now become immaterial. That case arose under the first clause of section 5198—an agreement to pay usurious interest—and may be given full force without making it applicable to the second clause of said section. The *Brown* case is, however, an authority for the proposition that interest is not

"paid" merely because included in a renewal note and that the lender cannot avail himself of the second clause of said section as having paid usurious interest merely on allegations of the including of usurious interest in renewal notes, and for the further proposition that the word "paid" in section 5198 refers to interest "actually paid."

Haseltine vs. Central Nat'l Bank, 183 U. S.

X.

Plaintiff alleges that all foreclosure proceedings are void.

Plaintiff in error (pp. 14-5) alleges that the foreclosure and decree and all proceedings thereunder "were and are illegal and void." If this allegation is given credit, then such void proceedings not only do not amount to payment of usurious interest but also do the plaintiff in error no harm and the demurrer was rightly decided.

We submit that under the record of this action the writ of error should be dismissed for want of jurisdiction or the judgment of the supreme court of Iowa should be affirmed.

Respectfully submitted,

ASA F. CALL,
HENRY J. TAYLOR,
Associate Counsel for Defendant in Error.